

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE
BECHEN, RONALD BIENDSEIL, RON BOONE, VERA
BOONE, ELVIRA BUMPUS, EVANJELINA
CLEEREMAN, SHEILA COCHRAN, LESLIE W.
DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH,
CLARENCE JOHNSON, RICHARD KRESBACH,
RICHARD LANGE, GLADYS MANZANET,
ROCHELLE MOORE, AMY RISSEEUW, JUDY
ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-
BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE
and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability
Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER, GERALD
NICHOL, THOMAS CANE, THOMAS BARLAND, and
TIMOTHY VOCKE, and KEVIN KENNEDY, Director
and General Counsel
for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI,
PAUL D. RYAN, JR., REID J. RIBBLE,
and SEAN P. DUFFY,

Intervenor-Defendants.

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Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

**PLAINTIFFS' MOTION TO EXTEND TIME IN WHICH TO MOVE TO COMPEL
PRODUCTION OF DOCUMENTS AND TESTIMONY**

VOCES DE LA FRONTERA, INC., RAMIRO VARA,
OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability
Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER, GERALD
NICHOL, THOMAS CANE, THOMAS BARLAND, and
TIMOTHY VOCKE, and KEVIN KENNEDY, Director
and General Counsel for the Wisconsin Government
Accountability Board,

Defendants.

1. On November 30, 2011, the legislature moved to quash a subpoena for documents and deposition testimony that plaintiffs served on Joseph Handrick, a consultant hired by the legislature for the purpose of legislative redistricting. (Dkt. 63) On December 6, the legislature filed an emergency motion to quash a subpoena that plaintiffs had served on Tad Ottman, a legislative aid to Senate Majority Leader Scott Fitzgerald, which similarly sought deposition testimony and the production of documents. (Dkt. 72) Ruling on those motions, on December 8, the Court held that the legislative and attorney-client privileges do not shield either the testimony or production of documents by Mr. Handrick or Mr. Ottman. (Dkt. 74)

2. On December 13, the legislature filed a “motion for clarification” of the Court’s December 8 order. (Dkt. 77) In a nine-page order, the Court denied that motion to the extent that it sought relief from the Court’s earlier ruling that the asserted privileges do not apply. (Dkt. 82)

3. Counsel for both the legislature and the defendants in this case, the Government Accountability Board, have continued to interpose objections based on the assertion of legislative and attorney-client privileges, preventing plaintiffs from taking testimony and obtaining relevant materials. *See* Declaration of Douglas M. Poland in Support of Plaintiffs' Response to Motion for Review by Three-Judge Court of Orders of Dec. 8, 2011, and Dec. 20, 2011 (Dkt. 89) ("Poland Decl.") at ¶¶ 11, 15-16, 18-19.

4. Last week, plaintiffs proceeded with the depositions of Messrs. Handrick and Ottman, as well as Adam Foltz, a legislative aid to Assembly Speaker Jeff Fitzgerald, pursuant to subpoenas issued to all three witnesses. *See* Poland Decl. at ¶¶ 10, 14, 17.

5. At the commencement of the depositions of Messrs. Foltz and Ottman, counsel for the legislature served on plaintiffs written objections to the document production requests in the deposition subpoenas to both witnesses, withholding production of documents based on assertions of legislative privilege. *See* Poland Decl. at ¶¶ 16, 18, Ex. 11, 13. All three deponents testified that they at one time had, and continue to have, materials in their possession, custody, or control that are responsive to plaintiffs' subpoenas but that they did not produce because of the assertion of privilege.

6. The same documents and categories of documents that the legislature is withholding from production also are responsive to plaintiffs' document requests to defendants, and in their Amended Initial Rule 26(a) Disclosures, defendants identified those same categories of documents as being among the "[p]otentially relevant documents" that they "may use . . . to support their defenses in this matter." *See* Poland Decl. ¶ 3, Ex. 3 at 12 ¶ 6 (identifying "Documents in the possession of the Legislature, and/or its various bodies, that were utilized to draft the 2011 legislative maps at issue"); *id.* at 12 ¶ 7 (identifying "Expert reports and analysis,

if any, in the possession of the Legislature, and/or its various bodies, that were utilized to draft the 2011 legislative maps at issue”). Yet, these very documents that defendants identified as being “relevant” and that they “may use to support their defenses” continue to be withheld from production to plaintiffs.

7. In addition to withholding the production of responsive, relevant documents, counsel for both the legislature and defendants instructed the deponents not to answer questions at their depositions based on claims of attorney-client privilege, the work product doctrine, and legislative privilege. *See* Poland Decl. ¶¶ 11, 15, 18.

8. The Court issued its December 20, 2011 order while counsel for the parties were attending Mr. Handrick’s deposition. After reviewing the order, counsel for the legislature stated that the legislature was considering and intended to seek appellate review of the Court’s December 20 order. The plaintiffs agreed to delay filing a motion to compel production of testimony and documents over which assertions of privilege had been raised to permit the legislature to seek appellate relief from the December 20 order. The parties agreed that if the legislature had not obtained relief from the December 20 order by December 30, the legislature either would make its witnesses available for deposition the first week of January, or the plaintiffs could move to compel. *See* Poland Decl. ¶ 13.

9. After the parties had reached their agreement, counsel for plaintiffs noted that the Court’s November 14, 2011 scheduling order provides only five days for a party to file a motion to compel after a discovery dispute arises. Given that the deposition of Joseph Handrick and the assertion of privileges occurred on December 20, under the five-day rule, counsel for plaintiffs would have only until December 27 (today) to move this Court to compel production of the testimony and documents over which privilege has been asserted.

10. On December 23, 2011, the legislature filed a “Motion for Review by Three-Judge Court of Orders of December 8, 2011, and December 20, 2011” (Dkt. 84). Plaintiffs are filing a response to that motion today.

11. The Court’s November 14 scheduling order provides that the Court may extend deadlines upon motion of a party “for cause shown.” Given the parties’ stipulation that Plaintiffs will not move before December 30 to compel the production of documents and testimony withheld pursuant to objections that the legislature raised on December 20, and considering further that the parties currently are briefing the legislature’s December 23 motion seeking relief from the Court’s December 20 order, plaintiffs believe that the circumstances identified in this motion establish “cause” to extend plaintiffs’ deadline in which to move to compel the production of documents and testimony from December 27, 2011, until five days after the Court rules on the legislature’s December 23 motion.

Dated: December 27, 2011.

GODFREY & KAHN, S.C.

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